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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| RAF ENTERPRISES LLC, et al.,<br>Plaintiffs and Respondents,<br>v.<br>TRIDENT LLC, et al.,<br>Defendants and Appellants. | A098529<br><br>(Marin County<br>Super. Ct. No. CV001919) |

A jury found Fred Arko, Jr., liable for tortiously interfering with a contract between Robert Freeman and California Cafe Corporation (CalCafe) under which CalCafe had agreed to sell two Sausalito restaurants to Freeman. Arko was a part owner of the building in which the restaurants were located. The jury awarded Freeman $9.5 million in compensatory damages and assessed $45,000 in punitive damages against Arko. On appeal from the ensuing judgment, Arko contends that: (1) the liability verdict resulted from legal and evidentiary errors by the trial court; and (2) the damages award was not supported by substantial evidence. We affirm the judgment.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. Events Leading to Litigation

We summarize the trial evidence in the light most favorable to the prevailing side:

#### 1. *The Horizons/Ondine's Property*

Starting in 1983, Freeman and a partner opened a series of California cuisine restaurants in California. The restaurants were operated by Freeman's corporation, CalCafe. By 1997, CalCafe had expanded to approximately 15 restaurant sites located within and outside of California. Although CalCafe owned a few one-of-a-kind restaurants, its core business was to operate a chain of California cuisine chain restaurants that could be replicated in different cities. For his work with CalCafe, an industry newspaper honored Freeman in 1998, as one of the top six restaurateurs in the country.

In 1997, Arko contacted Freeman to see if he was interested in renting a restaurant site that Arko was negotiating to purchase on the Sausalito waterfront. Freeman was very interested in the possibility because he lived in Sausalito and had been successful with another waterfront site restaurant in Southern California. The first floor of the Sausalito property was being operated as a restaurant known as Horizons. The upper floor, which was being used as a banquet facility in 1997, had formerly been occupied by Ondine's, a French restaurant that Freeman had frequented and enjoyed years earlier. On behalf of CalCafe, Freeman negotiated a lease for the Horizons/Ondine's property (the Trident Lease) with Trident LLC (Trident), a limited liability company (LLC) formed by Arko and Linda Fotsch to own the property. CalCafe also entered into a Parking Agreement with Trident and another Arko-Fotsch LLC, known as Willy's, that owned surface parking facilities adjacent to the restaurant and in a nearby lot. As part of these transactions, CalCafe obtained a 20 percent interest in Trident and a 5 percent interest in Willy's. In addition, CalCafe agreed to invest $1 million in renovations to the Horizons/Ondine's property during the first two years of the Trident Lease.

The initial lease term was to run for ten years with three options to renew for additional five-year terms at market rates. Under the Trident Lease, these options could only be exercised by CalCafe or an affiliated entity. CalCafe agreed to pay a minimum rent of $44,010 per month for the first five years of the Trident Lease, increasing to $46,000 per month for the remaining initial term. In addition to minimum rent, CalCafe agreed to pay Trident an override equal to 8.5 percent of its gross food and beverage revenues, less the minimum rent, for any calendar month in which the percentage figure exceeded the minimum rent.

Ondine's opened in May 1999, and received extremely favorable publicity and reviews in its first few months of operations. The Bay Area's leading food critic, in an article entitled "Ondine's Spectacular Revival," rated Ondine's among the best restaurants in the Bay Area.

**2.** ***Freeman's November 1999 Asset Acquisition Agreement with CalCafe***

Freeman was chairman of the board of directors and chief executive officer of CalCafe in 1997. In 1998, a New York venture capital group that had invested substantial sums in the company took control of its board. The new board majority retained Freeman as the board chairman and continued to pay him an annual salary of $200,000, but it brought in a new company president, Hazem Ouf, to run CalCafe's operations. Freeman learned from Ouf that the board wanted him to focus on CalCafe's core business of establishing reproducible, brand-name restaurants. Restaurants such as Ondine's and Horizons, which could not be transplanted to other locations, were to be deemphasized. As a result of these discussions, Freeman proposed to CalCafe's board that he would help the company get out of the Horizons/Ondine's site by taking over and operating those restaurants himself in return for giving up his 20 percent interest in the company. After some months of negotiations, Freeman entered into an Asset Acquisition Agreement with CalCafe in November 1999 (the Acquisition Agreement).

Under the Acquisition Agreement, CalCafe agreed to transfer Ondine's and Horizons to RAF Enterprises LLC (RAF), a company formed by Freeman to own the restaurants. In return, Freeman was to surrender all of the CalCafe stock he owned, along with his ex-wife's stockholdings, which he purchased from her. He gave the company a promissory note for $390,000 payable over a four-year period, and agreed to give up his CalCafe employment, $200,000 annual salary, and benefits.

**3.** ***The December 1999 Lease Amendments and Consents***

CalCafe and Freeman both recognized that in order to consummate their transaction, Freeman needed to obtain the consent of Trident and Willy's to an assignment of CalCafe's leasehold interests in the Trident Lease and the Parking Agreement to RAF. Freeman first discussed his plan to purchase the restaurants with Fotsch, Trident's managing member, in the late spring or early summer of 1999. She told him that the assignment "sounded like it was possible" but that it needed to be a "package deal" in which CalCafe's minority interests in Trident and Willy's, and its Parking Agreement with Willy's, would have to be transferred to Freeman along with the Trident Lease. Freeman would have been willing to acquire the restaurants without the LLC interests.

In June 1999, Freeman wrote to Fotsch and Arko outlining his plans. The letter stated that some of his family members who owned shares in CalCafe might join in the restaurant purchase.[1] He also proposed to guarantee the rent with the assets of the restaurants as well as his personal assets, and to spend $500,000 on renovating Horizons. He enclosed a personal financial statement showing net worth in excess of $10 million, annual income of over $500,000, and access to a $200,000 line of credit. Early in his discussions with Fotsch and Arko, Freeman stated that he needed to have the same lease extension options that CalCafe had under the Trident Lease, i.e., the right to renew it for three five-year terms at market rates.

Freeman, Arko, Fotsch, and their respective attorneys continued to discuss the conditions on which a lease assignment would be granted during the summer of 1999. By October 1999, Freeman's attorney, Bruce Maximov, believed that the parties had reached agreement on all of the conditions required in order for Fotsch and Arko to consent to transfer of the leases. While Maximov worked with Trident's attorney, Steven Herman, to document Freeman's agreement with Fotsch and Arko, Freeman and CalCafe finalized language in the Acquisition Agreement conditioning the final closing of their transaction on: (1) the delivery of written consents by Trident and Willy's to CalCafe's assignment of the Trident Lease and Parking Agreement; and (2) waivers by Trident,

[1] At trial, Freeman explained that he had gotten some of his relatives to invest in CalCafe and did not want to leave them with the impression that he was leaving them behind. He was thinking that he could retain 10 percent of his holdings in CalCafe if his relatives wanted to surrender some of their CalCafe holdings for a stake in RAF. There is no indication in the record that this plan developed any further.

Willy's, and their respective members, of their rights of first refusal to purchase the interests in these entities to be transferred to Freeman.[2]

On December 17, 1999, Herman delivered to Maximov a First Amendment to Lease signed on behalf of Trident and First Amendment of Parking Agreement signed on behalf of Willy's. The leases, as amended, provided in relevant part that: (1) RAF (Freeman) would make $500,000 of tenant renovations to the Horizons restaurant space in 2000; (2) Trident would grant RAF (Freeman) the same lease extension rights that CalCafe had under the Trident Lease; (3) under both leases, CalCafe was to remain liable for the rent along with RAF;[3] (4) RAF would pay a security deposit of $44,010 to Trident at the closing of the Acquisition Agreement; (5) Trident was to have a right of first refusal to purchase the restaurants if Freeman decided to sell them; and (6) RAF would grant Trident and Willy's an increased trade credit of $20,000 annually under the lease.[4]

As agreed by the parties, Trident also delivered consents signed by Fotsch to CalCafe's transfer of its interests in these LLC's to Freeman. The consents recited that Fotsch was signing on behalf of Trident, Willy's, and each of their members. The signed lease amendments and consents were accompanied by a cover letter from Herman stating that "these documents are being delivered to you in trust" and would "have no effect unless and until" certain conditions were met. The conditions specified by Herman included the following: (1) the transactions had to be approved by Trident's and Willy's lenders; (2) the Alcoholic Beverage Control Commission (ABC) had to approve the

[2] The operating agreements for Trident and Willy's included "first refusal" clauses giving the LLC, and each member, the right to review any third party offer made for another member's interest, and to purchase that member's interest on the terms set forth in the third party offer.

[3] By separate agreement with CalCafe, Freeman agreed to personally guarantee any payments CalCafe was required to make as a result of RAF's default under the leases.

[4] Under the original Parking Agreement, CalCafe gave Trident the use of a card entitling Fotsch, Arko, and their guests to consume $10,000 of food and beverages per

transfer of CalCafe's liquor licenses to RAF; and (3) the transaction between CalCafe and Freeman and RAF must close.

Upon receipt of the signed documents from Herman, Maximov advised Freeman that it was safe for him to go forward with an Interim Management Agreement (IMA) with CalCafe. Herman had reviewed a draft of the IMA and had input into its terms. The purpose of the IMA was to allow Freeman and RAF to begin operating the restaurants pending final ABC approval for transferring the liquor licenses because the parties anticipated that the Acquisition Agreement would close soon thereafter. Upon signing the IMA, RAF assumed all profits and losses of the restaurants, and Freeman was required to give up his $200,000 per year salaried employment with CalCafe.

**4. *Events After December 17, 1999***

The IMA was in effect from December 20, 1999 until April 12, 2000. Freeman spent $50,000 upgrading Horizons during that time. All rent due under the amended Trident Lease and Parking Agreement was timely paid out of the cash flow from Horizons and Ondine's, and RAF had $200,000 cash on hand as of April 12, 2000. The restaurants' gross sales of $521,000 in March 2000, were high enough to trigger the rent override clause in the Trident Lease for the first time. During this period, Ondine's was picked as one of the Bay Area's top restaurants by both San Francisco daily newspapers.

As of December 20, 1999, Freeman believed that the primary matters left to be cleared before he could close his transaction with CalCafe were: (1) final ABC approval for transfer of CalCafe's liquor licenses;[5] (2) Trident, Willy's, and CalCafe obtaining the consent of their bank lenders; and (3) Freeman's deposit at the closing of $44,010 for Trident's security deposit. As of the end of 1999, Freeman had $550,000 set aside in a Schwab account. If he was unable to obtain a bank loan, these funds were available to

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year at Ondine's and Horizons with no charge other than tax and tip. Fotsch insisted that this trade credit be increased to $20,000 per year as part of any lease assignment.

[5] Freeman was operating under temporary licenses pending final approval.

finance the Horizons renovations he had agreed to undertake under the First Amendment to Lease.

At the end of December 1999, CalCafe decided that Arko needed to personally sign the consents for CalCafe's interests in Trident and Willy's to be transferred to Freeman. Thus, as of January 25, 2000, Maximov and CalCafe were in agreement that four documents were required from Fotsch and Arko for the closing of the Acquisition Agreement: Arko's consents to the transfer of the two LLC interests and the consents of Trident's and Willy's lenders to the lease assignment and related transactions.

With the exception of these consents, all other conditions precedent to closing were either satisfied or would have been satisfied at the closing. CalCafe's lender gave its consent in January 2000. The ABC approval was proceeding routinely with every indication that ABC was ready to approve the transfer upon the closing of the transaction. Using either the restaurants' cash flow or his personal funds, Freeman was fully able to cover the approximately $50,000 required from him at closing for Trident's security deposit and other cash items.

During January and February 2000, Maximov contacted Herman multiple times in an effort to obtain the four consents required from Herman's clients. Herman raised no issue during this period about whether these consents would be forthcoming. In fact, in mid-February, Herman represented to Maximov that Arko and the banks had signed the necessary documents. When Maximov requested that the signed consent documents be delivered to him, Herman did not respond.

In February 2000, Maximov received a letter from Herman raising concerns about the $20,000 trade credit Fotsch and Arko were to receive. Freeman had informed Fotsch that, according to an ABC representative with whom he had spoken, continuing to allow trade credits to be applied to the purchase of alcohol would jeopardize Freeman's liquor license. Herman's letter claimed that Freeman's refusal to honor the trade credits for alcohol purchases was unacceptable and a default under the lease. Maximov faxed a response to Herman on February 16, 2000, in an effort to find a resolution of the trade credits issue, and left voice messages for him, but Herman did not respond until March 8,

2000. Herman's response was combative in tone, asserting that his clients would accept nothing less than full use of the trade credits for alcohol as well as food purchases, as had been the past practice.

Freeman, Fotsch, and Arko met to discuss the trade credit issue in mid-March 2000. At the beginning of the meeting, Freeman asked for the four outstanding consent documents. Before Fotsch and Arko responded on that point, the conversation moved to the trade credits issue. Freeman stated that if someone could give him authority saying the credit could be applied to alcoholic beverages, he would agree to it. No issues or questions were raised at this meeting about RAF's or Freeman's financial condition. According to Freeman, it was left at the end of the meeting that Arko would check with his own sources about ABC's position and that Fotsch and Arko would authorize Herman's release of the consent documents. When Maximov attempted to confirm these understandings in writing, Herman responded with a terse letter stating that no agreement had been reached between the clients.

After the meeting, Freeman had his associate, Ron Davis, contact a higher-level official at ABC who told him that trade credits could be used for alcohol as long as the price of the alcohol was not appreciably discounted. Despite the risk of relying on such unwritten advice, Freeman was willing to accommodate Fotsch and Arko on this issue because he was being pressured by CalCafe and felt desperate to get their transaction closed. Maximov informed Herman of the new development on March 17, 2000, and again requested the four consents. Herman did not respond to Maximov's March 17, 2000 fax or to a voice mail left on March 21, 2000. Maximov sent a second fax on March 23, 2000. Herman responded later that day in a vituperative tone, denying that the trade credit issue was resolved, and alleging that RAF and CalCafe were in serious default of their lease obligations due to the handling of the trade credit issue. The letter accused Freeman of rude conduct toward Fotsch. Herman stated that his clients had further, unspecified concerns relating to the proposed lease assignment and that "[a]ll outstanding points must be resolved to our clients' satisfaction before any transaction can go forward."

Maximov's follow-up attempts to get Herman to specify the issues his clients were concerned about failed. Instead, at a private meeting between Arko and Freeman in late March, Arko proposed that Freeman sell a 50 percent interest in RAF to him and Fotsch. Although flattered by the offer, Freeman told Arko that he was firmly committed to doing the deal himself and did not want partners. Nonetheless, Herman followed up with a letter to Maximov on April 3, 2000, repeating Arko's proposal.

Maximov responded to Herman's letter on April 5, 2000. By that time, CalCafe had informed Freeman that unless the transaction was ready to close by April 10, 2000, CalCafe would terminate the Acquisition Agreement and take management of the restaurants back from Freeman. In the letter, Maximov offered concessions regarding the trade credits, and stated that Freeman would be willing to discuss an ownership interest with Arko *after* his transaction with CalCafe closed. However, Maximov warned Herman that unless he delivered the four consents by April 10, 2000, there would be litigation against his clients.

Herman responded by fax on April 10, 2000, stating that CalCafe was guilty of multiple lease defaults. The alleged defaults included trash and broken furniture stored on the deck of the premises, a sign left over from a previous occupant, and menu changes made without landlord approval. None of the defaults specified in the letter had been mentioned in earlier correspondence. Herman asserted in the letter that "a landlord is not required to approve an assignment of a lease if the lease is in default," and ended it by declaring that Trident "will not allow RAF [] and/or Mr. Freeman to take over the Horizon's/Ondine's Lease."

On April 12, 2000, CalCafe terminated the IMA and Acquisition Agreement, and took possession of the restaurants back from Freeman and RAF the next day.

### B. PROCEEDINGS IN THE TRIAL COURT

#### 1. *Pleadings*

Plaintiffs' second amended complaint alleged seven causes of action against Trident, Willy's, Fotsch, and Arko: (1) specific performance of the December 17, 1999 First Amendment to Lease and First Amendment to Parking Agreement; (2) promissory estoppel precluding defendants from denying that they had provided their full and unconditional consent to the assignments required for Freeman to close his transaction with CalCafe; (3) breach of the implied covenant of good faith and fair dealing arising from the December 17, 1999 documents; (4) intentional interference by Arko and Fotsch with the Acquisition Agreement and the December 17, 1999 agreements; (5) intentional interference by Trident and Willy's with the Acquisition Agreement; (6) intentional interference by Arko and Fotsch with the Acquisition Agreement; and (7) declaratory relief as to whether defendants effectively consented to the necessary assignments from CalCafe to plaintiffs or whether the requirement for such consents should be excused as a matter of law.  Plaintiffs sought punitive damages in connection with their fourth, fifth, and sixth causes of action.

Prior to trial, the trial court dismissed plaintiffs' first, second, third, fourth, and seventh causes of action, holding as a matter of law based on undisputed facts that the documents delivered to plaintiffs' counsel on December 17, 1999, did not constitute an enforceable contract between plaintiffs and defendants.[6]

**2. *Defense Theories and Evidence***

Defendants' primary theory at trial was that they had an absolute right or privilege to withhold their consent to Freeman's transaction with CalCafe in order to protect their own business interests.  Their initial willingness to consent to the transfer of the leasehold and LLC interests to Freeman had been predicated on Freeman's verbal assurances that he would be bringing in other financial investors.  Freeman would not disclose the investors' names because they were CalCafe executives.  According to defendants, they backed away from the deal when Freeman disclosed to them, allegedly for the first time at the March 13, 2000 meeting, that no other investors would be coming in with him. Arko and Fotsch were shocked to learn that the financial viability of the restaurants

[6] To the extent that the fourth cause of action for interference with contract relied on the Acquisition Agreement as the contract interfered with, the court further held that it was merely duplicative of the sixth cause of action.

would be dependent on Freeman and his personal assets alone, putting their own investment in the property at risk. Rather than refuse the lease assignment outright at that point, Arko came back with a proposal to purchase a 50 percent interest in the restaurants himself as a means of spreading the risk. Defendants argued that once Freeman rejected that alternative, they were justified in refusing to consent to the assignments in order to protect their own business investments.

Freeman presented evidence that defendants were not acting to protect any existing business interest, but in order to force Freeman to sell them 50 percent of his restaurant business at a reduced price. Freeman denied representing to defendants that there would be other financial partners and offered evidence that defendants' contrary claim was merely pretextual. He presented testimony and documents showing that defendants accepted his personal financial information and projections, signed consents and lease amendments, and engaged in extensive correspondence with him and his attorney over a period of several months without ever raising concerns about his lack of other "money" partners or adequate financing. Freeman pointed out that in correspondence written after the March 13, 2000 meeting, Herman never claimed that Freeman had misled his clients or misrepresented his financial backing. He argued that defendants in reality had greater security with RAF as the tenant compared to CalCafe because RAF, CalCafe, and Freeman would all have been liable for rent under the amended lease, and that the restaurants' proven cash flow was more than sufficient to secure payment of the rent. By its verdict, the jury implicitly rejected defendants' factual scenario.

### 3. *Verdict, Judgment, and Appeals*

Following a three-week trial, the jury returned a unanimous verdict that each of the defendants was liable for intentional interference with contract. By a nine-to-three vote, the jury found by clear and convincing evidence that each defendant was guilty of malice in the conduct constituting interference with contract. The jury awarded plaintiffs $9.75 million in compensatory damages, and assessed punitive damages against Fotsch and Arko in the amount of $45,000 each.

Defendants timely appealed from the ensuing judgment. Plaintiffs cross-appealed from the judgment and the order granting defendants' motion for summary adjudication. Defendants Fotsch, Trident, and Willy's dismissed their appeals, and plaintiffs dismissed their cross-appeal.

## II. DISCUSSION

Arko contends that the judgment must be reversed because: (1) the Acquisition Agreement was a mere proposal that never became an enforceable contract; (2) Arko's refusal to waive his contractual right of first refusal to purchase CalCafe's interests in the two LLC's could not as a matter of law constitute interference with contract; (3) the trial court prejudicially erred in admitting evidence inconsistent with its summary adjudication order; and (4) the jury's award of lost profits was not supported by substantial evidence.

### A. APPLICABLE LAW

To prevail against Arko on his intentional interference with contract claim, Freeman had to establish the following elements: "(1) a valid contract between [him] and a third party; (2) [Arko's] knowledge of this contract; (3) [Arko's] intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) While the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations requires only proof of interference. (*Id.* at p. 1129.)

Compared to interference with prospective economic advantage, claims of interference with an existing contract enjoy greater solicitude in the courts. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55.) The rationale for this distinction is that "the exchange of promises which cements an economic relationship as a contract is [more] worthy of protection from a stranger to the contract." (*Ibid.*) Thus, intentionally disrupting an existing contract is deemed to be a wrong in and of itself. (*Id.* at pp. 55-56.) There is no further requirement to prove the wrongfulness of defendant's conduct. (*Ibid.*)

Even at-will contracts or contracts containing express termination clauses can support a claim of interference with contract. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.*, *supra*, 50 Cal.3d at p. 1128.) A void contract will not support a cause of action for interference with contract. (*A. Mark Coin Co. v. General Mills, Inc.* (1983) 148 Cal.App.3d 312, 320, 321.) Some appellate cases have held that a voidable or unenforceable contract also cannot support an interference with contract claim. (See *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 [contract unenforceable under federal statute requiring a signed and communicated memorandum of it], disapproved on other grounds in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, fn. 11; *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 877–880 [lease subject to statute of frauds defense].) These precedents conflict with earlier cases holding that voidable contracts are protected from interference by a third party. (See *Golden v. Anderson* (1967) 256 Cal.App.2d 714; *Zimmerman v. Bank of America* (1961) 191 Cal.App.2d 55.) The rationale for the latter decisions was put as follows: " '[O]ne who unjustifiably interferes with the contract of another is guilty of a wrong. And since men usually honor their promises no matter what flaws a lawyer can find, the offender should not be heard to say the contract he meddled with could not have been enforced.' " (*Golden v. Anderson*, at p. 719, quoting *Harris v. Perl* (1964) 41 N.J. 455.)

An intentional act designed to disrupt a contractual relationship is not actionable as interference with contract if the defendant pleads and proves the affirmative defense of justification. (*Aalgaard v. Merchants Nat. Bank, Inc.* (1990) 224 Cal.App.3d 674, 683.) "The test of whether there is justification for conduct which [interferes with a] contract turns on a balancing of the social and private importance of the objective advanced by the interference against the importance of the interest interfered with, considering all the circumstances including the nature of the actor's conduct and the relationship between the parties." (*Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73, 80.) For example, actions taken to protect a present, existing economic interest that is threatened by another's contract, such as the right to continue receiving rental income from a tenant, are generally considered justified. (*Id.* at p. 81.) But acts intended to secure new advantages, such as refusing consent to a lease assignment for the purpose of obtaining a new lease on more favorable terms, have been held to fall outside the justification defense. (*Id.* at p. 82.)

Whether an actor's interference with another's contract is privileged or justified is a question of fact: "The question on the issue of privilege is whether the actor's conduct was fair and reasonable under the circumstances, which is a question for determination by the trier of fact." (*Sade Shoe Co. v. Oschin & Snyder* (1984) 162 Cal.App.3d 1174, 1180 (*Sade Shoe Co*.).)

**B. ENFORCEABILITY OF ACQUISITION AGREEMENT**

Arko contends the Acquisition Agreement was not a valid enforceable contract because it depended on a number of contingencies, including most importantly, Freeman's ability to negotiate an assignment of the Trident Lease on acceptable amended terms. According to Arko, Freeman's request that he be able to exercise the renewal options in the lease required that Trident and RAF agree to a new, amended lease rather than a simple assignment of the original lease. The significance of the distinction from Arko's point of view is as follows: Had the Acquisition Agreement been conditioned on a simple assignment of the Trident Lease, the well-established legal principle that a landlord cannot unreasonably withhold its consent to an assignment would have assured the fulfillment of the condition. (See *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488 (*Kendall*).) But the Acquisition Agreement was instead conditioned on the successful negotiation of a lease *amendment* to which Trident was under *no* obligation to consent. From this, Arko argues that Trident's refusal to give its final consent to the First Amendment was "absolutely privileged" and constituted the "failure of a condition to [the] enforcement of the Acquisition Agreement," and that, therefore, "there was no enforceable contract with which Arko could have interfered."

Arko's argument on this point is flawed. First, his premise that it was Freeman who insisted on reopening the terms of the lease does not do justice to the record. Freeman merely wanted the lease assignment to include the same market-rate renewal options that his assignor had. Absent a special clause in the lease stipulating that only CalCafe or an affiliate could exercise the renewal options, no lease amendment would have been necessary to address that point. But once Freeman requested this essentially nonsubstantive change in the terms of the tenancy, Trident used this as an opening to force him to accept a series of substantive changes in lease terms, all in the landlord's favor, that were otherwise impermissible. (See *Kendall*, *supra*, 40 Cal.3d at p. 501 [conditioning consent to assignment on charging a higher rent than originally contracted for is not commercially reasonable].) These amendments granted the landlord, among other things, a $44,000 security deposit, a written promise by Freeman to spend $500,000 renovating Horizons, a doubling of the landlord's trade credit, and a right of first refusal to purchase the restaurants from Freeman. Freeman, in fact, gave in to every lease concession Arko and Fotsch demanded. To hold that Freeman's interference claim fails because Trident itself demanded (and won) lease concessions from Freeman that it later purported to find insufficient would be an extremely harsh result.[7]

Second, Arko's legal premise is also wrong. A contract is valid and enforceable for purposes of an interference with contract claim even if full performance of the contract depends on the actions of a third party. In *SCEcorp v. Superior Court* (1992) 3 Cal.App.4th 673, the plaintiff alleged interference with a merger agreement between itself and another electric power company. The defendant demurred to the complaint on the ground that as a matter of law plaintiff could not state an interference claim because regulatory approval was a condition precedent to completion of the merger and no approval had been given as of the time of the alleged interference. (*Id.* at p. 675.) In upholding the trial court's overruling of the demurrer, the appellate court observed that

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[7] Notably, Arko's theory that Freeman was demanding more than a mere lease assignment did not develop until this matter went to litigation. Herman wrote to CalCafe and Maximov on April 10, 2000, advising that his clients would not provide the needed consents. He justified the refusal by citing various newly-alleged lease defaults and explaining that "a landlord is not required to approve *an assignment of a lease* if the lease is in default." (Italics added.)

"[i]t is well established that contracts subject to conditions precedent can be the basis for tortious interference claims." (*Id.* at p. 681.) The court held that a condition precedent of regulatory approval should be treated no differently for that purpose "than other conditions precedent requiring other third party approvals or actions." (*Ibid.*) Arko cites no contrary authority.

Finally, Arko claims as a factual matter that the collapse of the Acquisition Agreement proximately resulted from defendants' assertedly privileged conduct in refusing to agree to an amended lease, causing a condition of the Agreement to fail, rather than from any unprivileged conduct on their part. However, whether Arko's causal theory was supported by the evidence, and whether his conduct in allegedly withholding his consent to a final and binding lease amendment was in fact privileged, were matters for the jury to decide. (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 694; *Sade Shoe Co.*, *supra*, 162 Cal.App.3d at p. 1180.)

There was substantial evidence at trial from which the jury could find that Arko and the other defendants: (1) did in fact manifest their apparent consent and agreement to all material terms of the First Amendment to Lease; and (2) had no legal right or privilege to withhold their final consent for pretextual reasons. That evidence showed that it was defendants who wanted the great bulk of the lease amendments, and that Freeman gave them every material concession they demanded. The jury was entitled to conclude from these facts that the eleventh hour withholding of final consent to the amendments on demonstrably pretextual grounds was not justified or privileged. There was also substantial evidence that the Acquisition Agreement failed to close solely because defendants deliberately withheld other consents already signed by themselves and their lenders in order to improperly pressure Freeman into granting them 50 percent of the restaurants on attractive terms. The jury implicitly resolved all material issues of causation and privilege against Arko, and we will not disturb those findings on appeal.

Relying on Corporations Code section 17101, subdivision (a), Arko further argues that he cannot be liable for any breach of duty by Trident since he was only a nonmanaging, minority owner of Trident.[8] However, subdivision (c) of section 17101 provides that "[n]othing in this section shall be construed to affect the liability of a member of a limited liability company . . . to third parties for the member's participation in tortious conduct." Substantial evidence was presented at trial that Arko personally participated in tortious conduct. The evidence showed that he was personally involved in the decision to withhold necessary consent documents from Freeman, and in the formulation of pretextual justifications for that conduct. There was also evidence from which the jury could reasonably conclude that Arko sought to exploit the situation as part of his own plan to obtain an interest in the restaurants for himself and Fotsch, not for the LLC.

We decline to consider Arko's objections to the testimony of Freeman's experts on alcoholic beverage licensing and real estate licensing. The objections are relegated to two footnotes in Arko's opening brief. Such wholly undeveloped arguments are insufficient to preserve these issues for appellate review. (See *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624, fn. 2; *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 900, fn. 5.)

### C. RIGHT OF FIRST REFUSAL

Arko contends that the trial court erred in instructing the jury as follows: "Where an LLC operating agreement provides for transfer of an ownership interest only with the prior consent of a non-transferring member, such consent may be withheld where the non-transferring member or members have a good faith[,] commercially reasonable objection to the proposed transferee[.] [A]n LLC member may not arbitrarily or unreasonably withhold his or her consent to such a transfer." In accepting this instruction, which Freeman had proposed, the trial court acknowledged that it was

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[8] With certain exceptions not relevant here, section 17101, subdivision (a), provides that "no member of a limited liability company shall be personally liable under any judgment of a court, or in any other manner, for any debt, obligation, or liability of the limited liability company, whether that liability or obligation arises in contract, tort, or otherwise, solely by reason of being a member of the limited liability company."

extending the holding of *Kendall, supra*, 40 Cal.3d 488, that a landlord may not unreasonably withhold its consent to a lease assignment, to individual members of closely held LLC's.

Relying on *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342 (*Carma*), Arko maintains that he had an absolute legal right to withhold his consent to the transfer of CalCafe's interests in Willy's and Trident to Freeman because he had no duty to waive his right of first refusal to acquire those interests himself. In *Carma*, the California Supreme Court declined to apply *Kendall*'s "commercial reasonableness" standard where the landlord had negotiated for the contractual right, if the tenant gave notice of its intent to sublease or assign the premises, to terminate its tenant's lease and to negotiate a new lease with the tenant's sublessee or assignee. (*Carma,* at pp. 351-352, 361-362.) The purpose of the clause was to allow the landlord rather than the tenant to receive the benefit of any increased rental value for the leasehold. (*Id*. at p. 350.) The Court held that the defendant's express termination right could not be made subject to an implied covenant of good faith or commercial reasonableness. (*Id.* at pp. 361–363, 376.) The *Carma* court distinguished *Kendall* on the ground that what it found objectionable and unreasonable about the consent-to-assignment clause in *Kendall* was that the landlord could withhold its consent to assignment to get *more* rent than it had bargained for in the lease. (*Carma,* at p. 362.) In contrast, the termination clause in *Carma* specifically allocated the benefit of any increase in market rents occurring during the lease term to the landlord. (*Ibid.*) It was therefore the tenant in *Carma* who was trying to get more than it bargained for by attempting to defeat the landlord's contractual right to terminate the lease. (*Ibid.*)

Arko fails to demonstrate how *Carma* is relevant in the factual context of this case. *Carma* does not purport to limit *Kendall* strictly to consent-to-assignment clauses. In fact, the duty of good faith and fair dealing upon which *Kendall* is in part based is implied in *every* contract. (*Kendall*, *supra*, 40 Cal.3d at p. 500.) *Carma* holds merely that when a contract clause expressly reserves a particular economic benefit to one contracting party, that party is under no implied duty to forego that benefit. It does not immunize that party from liability for attempting to use the clause to disgorge unbargained-for benefits from a nonparty.

Arko's arguments regarding the first refusal clause also seem strangely disconnected from the record in this case. There is no evidence that Arko ever wanted to exercise his right of first refusal or communicated his interest in doing so. The evidence the jury heard was all to the contrary. Freeman testified that Fotsch insisted he take CalCafe's LLC interests as part of a package deal for gaining Trident's consent to the assignment of the Trident Lease. It may be inferred, at a minimum, that Arko had no objection to the transfer. No matter how the idea originated, the fact that Freeman would be acquiring those interests was well-understood by all concerned from the inception of Freeman's discussions with Fotsch and Arko until the entire deal collapsed in April 2000. At no time in these discussions did Arko ever: (1) complain that he had not been given adequate notice of Freeman's proposed acquisition of the LLC interests, or (2) express the slightest interest in exercising his right of first refusal to acquire those interests himself. This possibility was also never raised by attorney Herman in his correspondence with Maximov during February, March, or April 2000, when the deal was coming apart.

Even as late as the trial in this action, Arko did not cite his right of first refusal as a reason why he withheld the consents required for the Acquisition Agreement to close. The only concern he testified to was that RAF lacked sufficient financial backing to guarantee fulfillment of its lease commitments. The state of the record regarding Arko's interest in exercising his right of first refusal undercuts any claim of prejudice from the challenged jury instruction. The instruction only became relevant if the jury believed Arko withheld the consent documents in order to protect his right to acquire CalCafe's LLC interest. Since Arko offered no evidence on that point, and the great weight of the evidence in fact demonstrated that he had waived such right by his conduct, there is no reason to believe that the jury relied on the challenged instruction in reaching its verdict. Thus, even assuming for purposes of analysis that the instruction was erroneous, Arko fails, on *this* record, to demonstrate that it was prejudicial.

Further, the instruction given was not erroneous in the factual context of this case. Had Arko straightforwardly insisted on exercising his contractual right of first refusal at an early stage of the negotiations, he might be in a better position to claim a legal privilege for his conduct. But in this case, Arko and the other defendants expressly consented to (and by Freeman's account even insisted on) the transfer of the LLC interests to Freeman. In reliance on defendants' representations and signed consents, Freeman gave up a $200,000 per year salaried position and spent $50,000 of his own money on improvements to Horizons. Even as the situation unraveled in March and April 2000, Arko never cited his contractual right of first refusal as a reason for holding up the transaction, but raised an ever-shifting series of other, unrelated objections, knowing that Freeman was desperate to close his transaction with CalCafe.

The issue is whether the actor's conduct was fair and reasonable "considering all [of] the circumstances." (*Richardson v. La Rancherita*, *supra*, 98 Cal.App.3d at p. 80.) Here, the circumstances must include not only Arko's contract rights on paper but the time and manner in which he chose to assert or not assert them. Based on the record in this case, it was not error to inform the jury that Arko had to prove a "good faith[,] commercially reasonable objection to the proposed transferee" in order to rest on its first refusal right as the legal justification for its actions. If anything, given the paucity of evidence that Arko had ever asserted his right of first refusal, the instruction was unduly favorable to him.

Arko also contends there was no substantial evidence that he received proper notice of CalCafe's intent to sell its LLC membership interests to Freeman. We disagree. Delivery of a copy of the Acquisition Agreement to Herman was all that was required to provide notice to Arko and to start the running of the relevant time periods for the LLC's and Arko to exercise their rights of first refusal. The Agreement adequately disclosed the terms of a bona fide offer for purposes of section 8.3 of the LLC Operating Agreements. Any further responsibility for determining the cash value of the offer rested with the LLC's, not with the offeror or offeree. There was substantial evidence in the record that

Arko's time to exercise his first refusal right had expired by the time of the events precipitating this lawsuit.

In any event, Arko waived the notice issue. As Freeman points out, had Arko put notice in issue at the trial, Freeman could have responded with evidence and argument that Arko was estopped from claiming lack of notice by (1) Arko's repeated acts manifesting abandonment of his first refusal right and (2) Freeman's reliance on Arko's conduct and representations to his substantial detriment. (See *Estate of Anderson* (1997) 60 Cal.App.4th 436, 440.) Because Arko's delay in raising the notice issue prevented full litigation of the underlying facts, he has waived it. (See *Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11.)

**D. ADMISSIBILITY OF CONSENT EVIDENCE**

In its pretrial order granting defendants' motion for summary adjudication, the trial court held as a matter of law that attorney Herman's cover letter to Maximov of December 17, 1999, together with the attached First Amendment to Lease, First Amendment to Parking Agreement, and consents to the transfer of LLC interests signed by Fotsch, did not constitute a binding contract between Freeman and the defendants. The trial court explained the basis for its ruling as follows: (1) the conditions referred to in Herman's cover letter had never occurred;[9] and (2) defendants were the only signatories on the lease amendments and the consents were undated.

Citing the court's summary adjudication order, defendants thereafter moved in limine to preclude Freeman from putting in evidence at trial that the December 17, 1999 documents constituted "effective consents" to the assignment of the leases or to the transfer of CalCafe's LLC interests. Arko contends the trial court erred in denying his in limine motion because the evidence he sought to exclude contradicted the trial court's

[9] Herman's cover letter stated that the lease amendments and consents would not be effective until Herman received executed counterparts from all parties, ABC approved the liquor license transfers, lenders for Trident and Willy's approved the transactions, the Acquisition Agreement closed, and the security deposit and other fees due at closing were paid.

summary adjudication order. He maintains that in reliance on its erroneous evidentiary ruling the trial court allowed Freeman to offer testimony that was prejudicial to the defendants and inconsistent with its summary adjudication order.

We are not persuaded. The summary adjudication order merely determined that the amended leases did not constitute binding contracts, not that defendants' consents were ineffective for any purpose or that the December 17, 1999 documents were of no legal relevance. Freeman did not offer evidence that the consents were immediately binding and effective on December 17, 1999. Although Arko claims portions of Maximov's testimony discussing the LLC consents were contrary to the summary adjudication order, we perceive no such contradiction. Maximov was not testifying as to *when* the consents became legally binding, but only as to which of the defendants he believed would be bound by Fotsch's signature on the documents when they became effective. Contrary to Arko's contention, Maximov was not permitted to offer his legal opinion that the December 17, 1999 documents constituted a binding agreement. Arko's trial counsel objected to questions attempting to elicit such improper opinion testimony, and those objections were sustained. Arko's further broad-brush claim, that the trial court's evidentiary rulings allowed Freeman to prove his tortious interference claim with inadmissible breach of contract evidence, is unsupported by the record.

The trial court admitted no improper evidence concerning the legal effect of the documents in question.[10]

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[10] Although we have assumed for purposes of our analysis that the trial court correctly decided defendant's summary adjudication motion, we are not entirely persuaded of that. Freeman points out that, contrary to the trial court's written ruling: (1) all parties did sign the lease amendments on or shortly after December 17, 1999, and (2) defendants made no claim to the contrary in their motion. The other major factor the court cited, that Herman's cover letter set forth conditions precedent to the consents becoming effective, also does not negate the existence of a contract. A contract may be formed even though both parties condition their entire performance on future events, such as in *SCEcorp v. Superior Court*, *supra*, 3 Cal.App.4th 673 at pages 678-679, where a corporate merger agreement was conditioned on regulatory approval. A convincing argument can be made that the defendants in this case made a binding promise in

## E. LOST PROFITS EVIDENCE

Based on the testimony of Freeman's damages expert, Donald Winter, the jury awarded Freeman $714,100 and awarded RAF $9,035,024 in lost profits damages. Arko contends that the jury's award was not supported by substantial evidence because: (1) Winter failed to deduct from his estimate of future profits the asserted $4.2 million value of Freeman's CalCafe stock, which was part of the consideration Freeman was to have paid under the Acquisition Agreement; and (2) Winter's opinion was otherwise based on uncorroborated speculation.

### 1. *Deduction for Stock Value*

Arko correctly points out that for Freeman to recover damages for lost profits, he was required to furnish evidence of the *net* profits he would have earned from the restaurants but for the defendants' breach. (See, e.g., *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 222 [evidence of rental income without deduction for expenses cannot support award for lost profits].) Although conceding that Winter did make deductions for the ordinary operating expenses of the restaurants, such as rent, taxes, and insurance, Arko maintains that the value of the stock should also have been deducted when estimating their future net profits. We disagree.

The most important element of Freeman's damages was the loss of two income-producing assets, Horizons and Ondine's, that he would have obtained but for Arko's interference. Winter placed a dollar value on that loss by calculating the value of those assets, i.e., the present value of the net income after expenses that Freeman would have

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December 1999, to give their consents to the lease amendments and LLC transfers, such consents to be effective upon the closing of the Acquisition Agreement in accordance with its terms. If so, then defendants' subsequent conduct in preventing fulfillment of the conditions precedent to its consents was both tortious interference with the Acquisition Agreement *and* a contractual breach of the covenant of good faith and fair dealing implied in defendants' agreement with Freeman. Although no finding that the December 17, 1999 documents constituted a binding contract is required in order to sustain the jury's verdict, Freeman was significantly prejudiced by the trial court's ruling on that issue.

been able to earn from them. It would not have made sense for Winter to take the stock value into account in making this calculation because the amount of consideration that Freeman agreed to pay for the assets does not increase or diminish their value.

That is not to say that Freeman's CalCafe stock was irrelevant to the issue of compensatory damages. As a result of defendants' tortious interference, Freeman lost the opportunity to obtain income-producing assets, but he also avoided having to give up his CalCafe stock. The value of the stock, assuming it was non-negligible, thus became an offset to or a factor in mitigation of Freeman's damages. Perhaps the closest analogy would be the "special benefit rule" in tort law: "The courts in California have long recognized the application of what is commonly known as the 'special benefit' doctrine or rule in tort damages. [Citations.] The California rule is as follows: 'When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.' " (*Heckert v. MacDonald* (1989) 208 Cal.App.3d 832, 839; see also, *Hicks v. Drew* (1897) 117 Cal. 305, 314–315.)

As with other facts in mitigation of damages, the defendant has the burden of proving the amount of any offsets or special benefits that reduce the plaintiff's recoverable damages. (See, e.g., *Vitagraph, Inc., v. Liberty Theatres Co.* (1925) 197 Cal. 694, 699; *Morris v. Frudenfeld* (1982) 135 Cal.App.3d 23, 34; *Askari v. R & R Land Co.* (1986) 179 Cal.App.3d 1101, 1112.) Thus, Arko had the burden of proving the value of Freeman's shares and of advancing the argument that the value of the shares must be deducted from Freeman's lost profit and other damages. He carried neither burden.

Arko made no claim in the trial court that the stock value should have been deducted to calculate net profits or that it was otherwise a factor in mitigation of Freeman's damages. He has therefore waived the point. Moreover, Arko introduced no evidence as to the value of the stock. In fact, Arko's trial counsel elicited testimony from Freeman that, as a practical matter, there was no market for Freeman's stock because CalCafe was a privately held company. The $4.2 million valuation was based on the fact that a venture capital firm invested $14 per share in 1997 for a sizeable stake in the company, including the right to take control over its management if certain performance criteria were not met. That is not a reliable basis on which to value a minority interest carrying no right of management or control, at a point in time when the company's market prospects might be completely different than they had been three years earlier.

Valuing the stock of a privately held company is a complex undertaking requiring expert testimony and the consideration of multiple factors in addition to any relevant stock sales data that may exist. (See, e.g., *In re Marriage of Hewitson* (1983) 142 Cal.App.3d 874, 888.) There is simply no adequate basis on this record to determine the value, if any, of Freeman's stockholdings at the time of the breach. Having failed to raise the stock valuation issue until the present appeal, Arko is responsible for that state of the record, and is not entitled to rely on it as a ground for a new trial.

**2. *Lost Profits Testimony***

Arko's further contention, that Winter's testimony was too speculative to support the judgment, is also misplaced. Winter, a restaurant and hotel industry consultant, had extensive experience in evaluating the performance of Bay Area restaurants, including waterfront restaurants and restaurants in Sausalito and Tiburon. To project the net income that Horizons and Ondine's could have produced under Freeman's management, Winter started by calculating the actual net profit that CalCafe earned during its management of the restaurants in 1999 and 2000. He performed comparable calculations for the four months that RAF managed the restaurants in 2000, which showed a significant improvement in net profit.

Projecting RAF's four-month results for the 2000 calendar year, Winter calculated that RAF could have earned net profits exceeding $600,000 for the year 2000 before taking into account the specific changes that Freeman intended to make once RAF took ownership of the restaurants. These changes included installing a retractable awning and space heaters on an outside deck to increase seating capacity, and instituting programs to increase patronage by developing relationships with local hotels, setting up an Internet reservation system, intensifying marketing to local residents, and building up a profitable banquet business at Ondine's. Based on Freeman's track record with other restaurants and Winter's own experience in the industry, he believed these programs would be successful in increasing revenues. Taking these plans into account, and based on actual expense data for the restaurants during fiscal year 2000 and 2001, Winter estimated lost profit damages in 2000 of $666,000.

For 2001, Winter projected a 14 percent decline in revenues as a result of the effects of the recession and events of September 11, 2001. This was larger than the actual revenue effects that Freeman experienced during that period at other Bay Area restaurants he owned. Based on his 2001 reduced revenue estimate, Winter calculated that RAF's net profit from the restaurants would drop to approximately $220,000 in 2001 and come back up to $550,000 in 2002. Because of Freeman's skill, the extraordinary reviews Ondine's received under his management, and the programs Freeman had developed to increase patronage, Winter projected revenue to grow at a 10 percent rate in 2003 and 2004 as the restaurants headed toward maturity, and then to level off at 3 percent annually thereafter until the end of the last option term of the lease in 2022.

At trial, Winter also testified in detail about how he went about projecting restaurant costs for that time period, including changes in contractual rental payments, and other increases in the costs of operations. Winter's cost estimates included amounts reflecting repayment of Freeman's promissory note to CalCafe, compensation for Freeman's oversight of RAF's operations, and funding for an annual replacement reserve of two percent of revenues to keep the restaurants fresh and up to date. Putting the revenue and cost projections together, Winter calculated the net profits the restaurants would have earned in each year from 2000 to 2022. Using a variable discount rate that started at 16 percent for 2003, and increased to a maximum of 36 percent for the later years, Winter calculated that the present value of the restaurants' projected income stream would be $9,035,000. Winter explained that his discounting methodology was relatively conservative in giving substantially less weight to future profits than other discounting methods he could have used, and in accounting for market risk.

Arko attacks Winter's testimony on the grounds that Winter: (1) failed to explain how Freeman would fund the $500,000 in renovations that were required under the lease; (2) failed to account for any period of restaurant closure while the renovations were being performed; (3) assumed an unrealistic 10 percent revenue growth rate for the 2000 base year and ignored the revenue decrease Freeman experienced during the same time period at the Water Street Grille, another Sausalito restaurant he opened during the same time period; and (4) based his revenue projections on a "blind faith" that Freeman's marketing and expansion plans for Horizons and Ondine's would increase patronage.

Winter was examined on these points by both sides. He explained in detail the differences he perceived between the Water Street Grille and Horizons. The Water Street Grille was located upstairs and did not have good visibility or convenient parking. Most importantly, Freeman acquired the Water Street Grille site from Houlihan's, a nationally advertised restaurant chain. According to Winter, a substantial sales decline would be expected when the restaurant changed its name to one unfamiliar to tourists. In contrast, Horizons operated at a visible, street level location in a classic building with convenient parking and superior views. It occupied one of the best waterfront sites in the United States, and had been there for years. For all of these reasons, Winter did not believe Water Street Grille's initial financial performance was at all predictive of Horizons's performance.

Regarding the importance of Freeman's skills and growth plans, Winter testified that for nongeneric restaurants like Horizons and Ondine's the results are *largely* dependent on the operator's abilities and ideas. Arko's own expert testified that only a dozen or so people in Northern California have Freeman's level of experience in running restaurants. However, Winter did not simply defer to Freeman's experience. He testified that he independently evaluated Freeman's plans for the restaurants to determine which ones seemed likely to pay off and which did not. He also looked at the success Ondine's had in its few months under Freeman's management, the highly favorable reviews it received, and the decline in revenues that occurred when Freeman's management ended and it began receiving less favorable reviews. Thus, the record fails to bear out Arko's claim that Winter's conclusions were based on no more than blind faith in Freeman's abilities.

Regarding the renovation work, Winter testified that he assumed the actual work would be performed in 2000 or the first half of 2001, but that the cost of the work would be paid out of the replacement reserve fund over the first few years of the lease. Because Freeman had extensive experience in remodeling restaurants and working with contractors, Winter believed he would be able to stage and schedule the renovation work so that most of it could be performed at off-hours and during the restaurant's winter slow season. Winter noted that some restaurant expenses go down when the restaurant is closed. He believed his net profit projections for the 2000–2002 period adequately took account of both the cost and down time involved in remodeling Horizons.

Winter's assumptions and conclusions are, of course, open to legitimate dispute. They were in fact hotly disputed at trial. Arko's counsel cross-examined Winter extensively as to the basis for his opinions, and offered competing opinion testimony and argument on the issue of damages. But viewing the evidence in the light most favorable to the prevailing side, Winter's testimony was not so speculative or unrealistic that it undermines the jury's award.

## DISPOSITION

The judgment is affirmed.

Margulies, J.

We concur:

Stein, Acting P.J.

Swager, J.